DEFENSE INTELLIGENCE AGENCY

GENERAL COUNSEL

17 May 1976

MEMO FOR Office of the General Counsel, DoD
Mr. Robert Andrews

SUBJ: DCI Responsibility re Sources and Methods

The attached legal memorandum concludes that the National Security Act of 1947 which placed "responsibility" for sources and methods under the Director of Central Intelligence did not establish parameters of control nor grant any enforcement powers. The effort to control "unclassified" sources and methods by a secrecy agreement is not legally supportable.

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Memorandum for the Record 17 May 1976

SUBJECT: DCI Responsibility re Sources and Methods

1. The recent insistence on the part of CIA that the secrecy agreement mandated by EO 11905 encompass protection of unclassified intelligence sources and methods has not enjoyed DIA support. Some of the practical and legal objections were discussed in the attached enclosure. Inasmuch as it was considered appropriate that the minimal content for the secrecy agreement should be published to the Executive Branch by means of a DCID, a review of the DCI's authority in the premises has been required.

2. The National Security Act of 1947 makes the DCI (a) the head of CIA and (b) charges him the responsibility for the protection of sources and methods from unauthorized disclosure. CIA argues that, in essence, that this statute constitutes a grant of authority vice an assignment of responsibility. Under this interpretation the DCI would enjoy unfettered discretion in determining how sources and method information will be handled. This argument is considered unsupportable, fallacious and self-serving.

3. There are four arguments available to refute the CIA position:

a. DCI's place in the Executive Branch.

b. Congressional intent as witnessed by the Freedom of Information Act.

c. Past practice of the DCI.

d. CIA motivation.

4. While the DCI is to protect sources and methods from unauthorized disclosure, it does not necessarily follow that he determines what may or may not be authorized for disclosure or withhold that which has been authorized. The very language of the statute implies the existence of a criteria for this purpose which has been established by someone other than the DCI. If this is true then the DCI's role is more closely akin to that of a policeman or administrator of someone elses decision or system. This view is considered to be correct for several reasons. There is nothing in the Congressional Record, the hearings or the Congressional reports surrounding the passage of the National Security Act or any other document reviewed which supports the CIA interpretation and nothing which would refute that being advanced herein. On the contrary the evidence available would appear to support the position being taken herein.

5. The following language is excerpted from the National Security Act of 1947.

> "The function of the Council (NSC) shall be to advise the President...."
>
> "In addition to performing such other functions as the President may direct ... it shall, subject to the direction of the President, be the duty of the council --" Section 101.
>
> "There is hereby established under the NSC a CIA with a DCI who shall be the head thereof...."
>
> "For the purpose of coordinating the intelligence activities of the several government departments and agencies in the interest of national security, it shall be duty of the agency, under the direction of the NSC --"
>
> ..."and provided further, that the DCI shall be responsible for protection intelligence sources and methods from authorized disclosure...." Section 102.
>
> (emphasis supplied)

6. The language quoted above suggests that the New York Times was correct in its evaluation of the NSC when it said "(t)he NSC is an instrument of the President and not a corporate entity with authority of its own." This becomes clearer when note is taken of the fact that the NSC was incorporated into the Executive Office of the President by the Reorganization Plan #4, 1949, 63 Stat. 1067. Likewise the language establishing both the CIA and the DCI suggests that these offices are both junior to and subject to the control of the NSC and therefore the President. Their control by the President can be based on more than just statutory implication. As head of the Executive Branch of the Government, in taking care that the laws are faithfully executed, and in the conduct of foreign policy, he would exercise control over the two offices.

7. If the DCI is subject to the control of the NSC and the President then it is only logical that the President possesses the authority to make the decision or establish the system for the protection of sensitive information absent some clear indication to the contrary. The question must then be asked has he done so? The answer is yes.

8. A second question must also be asked and that is whether there is anyone other than the President who can make such a decision? What Congress creates it can disestablish. The Church Senate Committee report clearly articulates the Congressional belief that the responsibility and authority for the administration of the intelligence community is shared by the President with the Congress. Then too there is the example of Congressional action with regard to "restricted" information in the Atomic Energy Act.

9. This is not to say that the DCI might not have been able to fill the gap in the absence of action by the President, NSC or Congress. There is some precedent for that type of thing. But the same precedent also says that where there has been action by one authorized to act then the area is considered preempted from further action by the junior authority. Thus whatever "agency theory" might have existed as justification for the DCI acting for the President and Congress in the case of their silence, evaporated when the President issued EO 10290 and its successors 10501 and 11652. In EO 11652 the President speaks to the protection of information relating to the national defense and foreign relations otherwise known as the "national security". By means of these EOs he has prescribed what information is to be protected, what information is not to be protected and the method and criteria to be employed in making the determination. In EO 11652 he even cites as an example of information to be protected, "intelligence operations". Section 9 of the same EO reads as follows:

> "Section 9. Special Departmental Operations. The originating department or other appropriate authority may impose, in conformity with provisions of this order, (emphasis supplied) special requirements with respect to access, distribution and protection of classified information and material including those which presently relate to communications intelligence, intelligence sources and methods and cryptography".

10. It is suggested that "intelligence operations" is nothing more than a generic term into which sources and methods fits very comfortably. If "intelligence operations" does not encompass sources and methods then what is the justification for all the currently classified sources and methods information? Absent some other authority the classification would be illegal for EO 11652 prescribes its own exclusivity as the system to be employed by the Executive Branch. We are of course aware that Congress can and has acted to establish a "restrictive" system for the protection of Atomic Energy information in the Atomic Energy Act. This action was consistent however with the the theory of shared responsibility and in no way conflicts with the EO. It appears clear that the two sources from which the DCI might claim authority to act have effectively preempted him.

11. A review of the various memoranda and correspondence eminating from the White House, both classified and unclassified, and addressing the President's thoughts, intentions and direction, will reveal support for this theory and none for the CIA position. Of particular interest is a Secret White House memorandum of 21 December 1970.

12. Assuming, arguendo, that Congress might have been disposed to agreement with the CIA position in 1947, it must be recognized that they did not articulate agreement then nor is there evidence that they have done so since then. The evidence is to the contrary. In the Freedom of Information Act Congress spelled out a public policy to the effect that absent statutory or executive order authority for withholding of information, information relating to the operation of the U.S. Government must be made available to the public upon demand.

13. CIA claims that the National Security Act of 1947 falls under the exemptions enumerated in the Freedom of Information Act. The exemption they refer to is that which covers the Atomic Energy information, Tax Returns and now Privacy Act information. In other words they seek to equate the National Security Act of 1947 with this other legislation. This is believed to be tenuous at best. These other laws specifically prohibit the revelation of certain types of information. All the National Security Act of 1947 does is assign responsibility for the protection from unauthorized disclosure and not disclosure per se. Congress is silent as to what is authorized and not authorized thus leaving this determination up to someone else. The President has appropriately interjected himself as the individual who will make this decision.

14. When the past practices of the DCI are reviewed we find that he has at least in this context readily acquiesed to the President's guidance and direction. In this regard the secret White House memorandum of 21 December 1970 is in point and the DCI's response to that memorandum is in the form of the USIB-D-9.2/39 secret attachment of 23 April 1971 confirms the DCI's subjectivity to the President. The DCI's own words in his secret memorandum of 8 March 1971 recognizes his relative role in the scheme of things and as it applies to the question under discussion.

15. Another example of the DCI's belief that his authority is something other than now being advanced by CIA is found in footnote 21 on page 16 of the CIA publication entitled Guide to CIA Statutes and Laws (1970). In footnote 21 is a discussion of the case of U.S. v. Jarvinen wherein the Agency refused to allow employees to testify, in a Federal Criminal prosecution, about unclassified Agency sources. The judge held the reluctant witnesses in contempt for abuse of the claim of privilege. The following language appears:

> "Since the intelligence source was hardly a secret one and since no classified information was involved, an appeal, risking an adverse decision in terms harmful to the exercise of the Director's responsibility to protect sources and methods in the future, was not warranted. Pardon was sought, and granted by President Truman on December 16, 1952. (The subject of the prosecution) was acquitted. United States v. Jarvinen, No. 48547, October 1952 (unpublished)."

Pardons, of course, are executive acts of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed (see Black Law Dictionary Review 4th Ed. 1968 at page 1268). The DCI was either correct in not appealing the Jarvinen case or else he was derelict.

16. It is necessary at some point to look behind the CIA rhetoric which seeks to expand the authority of the DCI and thereby accomplish CIA's desire to protect all sources and methods regardless of classification. The CIA representatives, including a representative of the General Counsel, at recent meetings of the USIB SecCom working group have articulated their position most candidly. It is to the effect that they want to be able to withhold from public scrutiny all information relating to sources and methods. They recognize that the law makes this exceedingly difficult so they are seeking to create a special "class" of information denominated as sources and methods which will enjoy a "special dignity". By virtue of this "special dignity" CIA will be able to withhold the information by merely indicating that it relates to intelligence sources and methods and would thus avoid the problem of having to justify questionable cases of classification to courts and appropriate U.S. Government review organizations. The CIA representatives indicated in no uncertain terms that they have little or no confidence in the above mentioned groups' appreciation for or willingness to accept CIA arguments.

16. In summary, it appears that the CIA is not in fact advancing a good faith argument but is rather making a blatant attempt to circumvent laws with which it does not agree. To support them in this matter will raise questions of legality or impropriety.

1 Enclosure
DIA Ltr to USIB,
U-52,300/DS-6, 28 Apr 76

Assistant General Counsel
Defense Intelligence Agency

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20301

28 April 1982

U-52,300/DS-6

MEMORANDUM FOR THE CHAIRMAN, UNITED STATES INTELLIGENCE BOARD

SUBJECT: Secrecy Agreements for Intelligence Sources and Methods

1. I have watched with interest the efforts of the United States Intelligence Board Security Committee (USIB SECOM) working group to produce a Director of Central Intelligence Directive (DCID) which will satisfy the Director of Central Intelligence's (DCI's) responsibility under Section 7.a. of Executive Order 11905. A consensus appears to have been reached as to minimum requirements for the secrecy agreement, but a serious problem has arisen as to the scope of the material to be encompassed by the agreement.

2. The Central Intelligence Agency (CIA) membership is pressing for the inclusion in the agreement of both classified and unclassified intelligence information containing sources and methods. DIA cannot support or endorse any secrecy agreement which purports to restrict a DoD employee's use of unclassified information. A number of cogent reasons necessitate this position.

3. The secrecy agreement is intended to serve one basic purpose - protection of intelligence sources and methods by three means:

a. A psychological deterrent.

b. Provide a contractual basis for prepublication judicial restraint.

c. Administrative and disciplinary action against violators of the agreement.

Each of the methods contains sub silentio certain inherent requirements in order to be successful. In addition, administrative convenience recommends the use of a single piece of paper which would include all aspects of an agency's secrecy agreement.

4. For a psychological deterrent to be effective, it must be creditable, logical and reasonable. Prior judicial restraint as enunciated in the leading case (U.S. v. Marchetti) requires a contractual relationship containing consideration and which, for constitutional reasons, is limited to classified material. Adverse administrative action or disciplinary action against a government employee must be reasonable and is subject to certain administrative due process requirements. In this

regard it must not be forgotten that only a minority of the Executive Branch employees fall within the excepted service category or are in some fashion exempt from the protection afforded by the Constitution, civil service or military regulations from arbitrary and capricious agency action including termination of employment.

5. While neither your statutory responsibility to protect intelligence sources and methods nor Executive Order 11905 speak specifically of "classified" sources and methods only, it is believed that this is clearly implied. The need for protection of sources and methods is founded on their relationship with national defense and foreign relations. This is the criteria for classification of information established by the President in Executive Order 11652. A strong argument can be made that Executive Order 11652 is the exclusive means available for the protection of information of this type. Any attempt to protect unclassified sources and methods by means of a secrecy agreement could be considered as second classification system which would of course be contrary to the prohibition contained in Executive Order 11652. In view of the Fourth Circuit U.S. Court of Appeals holding in U.S. v. Marchetti, it is believed that any effort on the part of the government to seek a prepublication restraining order of unclassified sources and methods would be doomed to failure from the outset.

6. When Executive Order 11905 is viewed in the context of the remarks made at the White House press conference by Mr. Marsh at the time the Executive Order was made public, the intent of Section 7.a. appears to be simply to insure that secrecy agreements would be used throughout the Executive Branch and nothing more. A review of Attorney General Levi's remarks on the same occasion with regard to the accompanying White House sponsored legislation suggests that the purpose of the legislation was to provide a punitive sanction to run concurrently and coextensively with the civil remedy which would be available as a result of the Section 7.a. agreement. The legislation specifically refers to "properly classified and designated" intelligence sources and methods. We can find no indicia of Presidential intention to introduce any novel concepts or to deviate from the generally recognized, accepted and understood practices and procedures for the safegurading of information "which bears directly on the effectiveness of our national defense and the conduct of our foreign relations."

7. From the purely practical point of view:

a. DoD has no unclassified sources and methods which require protection by means of a secrecy agreement.

b. DoD could not in good conscience justify protection of unclassified sources and methods in the federal courts.

c. The imposition of such a requirement by DCI would prove highly embarrassing to the Department in that it has neither the personnel rules and regulations nor the procedures for supporting the full implication of the requirement, nor does it feel that they could be obtained.

d. Should an occasion present itself when the Department was forced to act on such a basis, it would be subjected to public, press and Congressional and probably judicial criticism that it would just as soon avoid.

e. The imposition at this time of requirements which would not be enforceable throughout the Executive Branch could only serve to further degrade the credibility of our security system.

8. Finally, the DoD General Counsel concurs with me and my General Counsel in the belief that Section 7.a. of Executive Order 11905 requires only the publication of a DCID which will prescribe minimum standards for a secrecy agreement. Agencies and departments of the Executive Branch would be free to impose such additional requirements as might be needed by individual situations. Since there is unanimity of opinion that Executive Order 11905 did anticipate the protection of classified sources and methods, the impending deadline and the novelty of the CIA position, it is recommended that the DCID be limited in scope to classified sources and methods and the breaking of new ground be saved for a later date.